

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     FINAL ORDER  
88504-s76F BY JANICE E. DIETZ     )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 30, 1994, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 88504-s76F is granted to Janice E. Dietz to appropriate 50 gallons per minute up to 1.64 acre-feet per year for fishery, wildlife and waterfowl. The point of diversion and place of use shall be located in Lot 12 of Seeley Lake Estates No. 2, generally located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 1, Township 16 North, Range 15 West, Missoula County. The means of diversion shall be a six-inch pipeline with a control valve so that the flow of water diverted can be controlled. The water shall be piped to an off-stream reservoir with a capacity of .1 acre-foot located in Lot 12 of Seeley Lake Estates No. 2,

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generally located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 1. The period of appropriation and use shall be from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30th of each year to the Water Resources Regional Office, Town and Country Shopping Center, 1610 South 3rd Street West, Suite 103, P.O. Box 5004, Missoula, MT 59806.

C. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

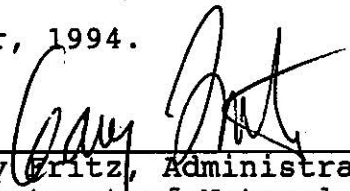
D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 1 day of December, 1994.

  
\_\_\_\_\_  
Gary Gritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 8th day of December, 1994 as follows:

Janice E. Dietz  
5123 Clearview Way  
Missoula, MT 59803

Larry Howell  
Connell, Beers & Alterowitz  
P.O. Box 7307  
Missoula, MT 59807-7307

Brice T. McGuire  
P.O. Box 951  
Seeley Lake, MT 59868

Jack & C.B. Rich  
P.O. Box 495  
Seeley Lake, MT 59868

Robert & Patricia Griffes  
P.O. Box 694  
Seeley Lake, MT 59868

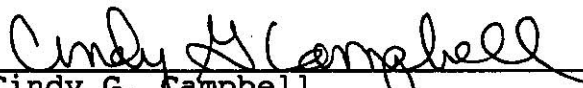
Cheryl Burmeister  
P.O. Box 173  
Seeley Lake, MT 59868

Edward L. Bezanson  
Double Arrow Enterprises  
P.O. Box 747  
Seeley Lake, MT 59868

Double Arrow Ranch  
Land Owners Assoc.  
% Stan Nicholson, Pres.  
P.O. Box 307  
Seeley Lake, MT 59868

Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     PROPOSAL FOR DECISION  
88504-s76F BY JANICE E. DIETZ        )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on September 13, 1994, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Janice E. Dietz for Application 88504-s76F under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicant appeared at the hearing by and through counsel, Larry Howell.

Applicant's father, Robert Kelly, appeared at the hearing but did not testify.

Objectors Brice and Mary McGuire appeared at the hearing *pro se*.

Objectors Robert and Patricia Griffes appeared at the hearing *pro se*.

Karl Uhlig, Water Resources Specialist with the Missoula Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing and was called to testify by Applicant.

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Objectors Jack and C. B. Rich, Cheryl Burmeister, Double Arrow Ranch Land Owners Association, and Double Arrow Enterprises did not appear at the hearing nor had any of these objectors contacted the Hearing Examiner prior to the hearing; therefore, in accordance with Mont. Admin. R. 36.12.208 (1994), these objectors are in default and do not have status as parties in this matter.

#### **EXHIBITS**

Applicant offered three exhibits for the record. There were no objections to any of the exhibits which were accepted into the record.

Applicant's Exhibit 1 is a one-page letter dated September 8, 1994, from Janice E. Dietz to the Department amending her application by reducing the flow rate from 340 gallons per minute to 50 gallons per minute and installing a valve in the pipeline to regulate the flow of water.

Applicant's Exhibit 2 is a recent photograph of the pond which Applicant seeks to fill by this appropriation. The point of interest, along with the pond itself, is the embankment which was constructed to Soil Conservation Service (SCS) specifications.

Applicant's Exhibit 3 is a one-page letter, dated August 11, 1994, from Tara Comfort, District Administrator with the Missoula County Conservation District to Rod Dietz informing him that the final inspection of the project had been performed and that the project is in full compliance with the SB-310 law.

### PRELIMINARY MATTERS

During the hearing Mary and Brice McGuire and Robert and Patricia Griffes withdrew their objections in this matter. However, an applicant is not relieved of the duty to present evidence to satisfy Applicant's substantive burden of proof when all parties withdraw their objections.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

### FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302 (1993) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Applicant duly filed Application 88504-s76F with the Department on February 7, 1994, at 10:35 a.m. (Department file.)

3. Pertinent portions of the application were published in the *Seeley Swan Pathfinder*, a newspaper of general circulation in the area of the source, on May 5, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Six timely objections were received and Applicant was notified of

those objections by a letter from the Department dated July 15, 1994. (Department file.)

4. Applicant seeks to appropriate 50 gallons per minute up to 1.64 acre-feet per year for fishery, wildlife, and waterfowl. The proposed point of diversion and place of use are located in Lot 12 of Seeley Lake Estates No. 2, generally located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 1, Township 16 North, Range 15 West, Missoula County. The proposed means of diversion is a six-inch pipeline with a control valve so that the flow of water diverted can be controlled. The water will be piped to an off-stream reservoir with a capacity of .1 acre-foot located in Lot 12 of Seeley Lake Estates No. 2, generally located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 1. The reservoir was constructed to meet Soil Conservation Service specifications. The proposed period of appropriation and use is from January 1 through December 31, inclusive of each year. (Applicant's Exhibits 1, 2, and 3, and Department file.)

5. The flow rate in Trail Creek on November 1, 1993, was 2.9 cubic feet per second or 1301.5 gallons per minute. The flow rate during the high spring runoff in 1993 was 34 cubic feet per second or 15,259 gallons per minute. (Department file.)

6. After the initial filling of the pond, the water use will be nonconsumptive with the exception of .08 acre-foot which will be lost to evaporation. (Department file.)



7. There are no pending permits or developments for which water has been reserved in the source of supply. (Department file and records.)

8. Applicant owns the proposed place of use. (Department file and testimony of Karl Uhlig.)

9. There were no objections to this project concerning water quality. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Mont. Code Ann. Title 85, chapter 2 (1993). See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

...

(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

4. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13,

part 45, may file a valid objection. Mont. Code Ann. § 85-2-311(2) (1993). No valid objections relative to subsections 85-2-311(1)(g), (h), or (i) were filed for this application.

Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (h), or (i). See Finding of Fact 9.

5. The proposed uses, fishery, wildlife and waterfowl, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1993).

6. Applicant has proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed and that during the period Applicant seeks to appropriate, water is reasonably available in the amount Applicant seeks to appropriate. See Findings of Fact 5 and 6.

7. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4.

8. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected by the proposed appropriation. See Findings of Fact 4, 5, and 6.

9. Applicant has a possessory interest, or the written consent of the person who has the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 8.

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been

issued or for which water has been reserved. See Finding of Fact 7.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 88504-s76F is granted to Janice E. Dietz to appropriate 50 gallons per minute up to 1.64 acre-feet per year for fishery, wildlife and waterfowl. The point of diversion and place of use shall be located in Lot 12 of Seeley Lake Estates No. 2, generally located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 1, Township 16 North, Range 15 West, Missoula County. The means of diversion shall be a six-inch pipeline with a control valve so that the flow of water diverted can be controlled. The water shall be piped to an off-stream reservoir with a capacity of .1 acre-foot located in Lot 12 of Seeley Lake Estates No. 2, generally located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 1. The period of appropriation and use shall be from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right

Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.


C. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 30<sup>th</sup> day of September, 1994.

  
Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6615

**CASE # 88504**

**FILMED**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 30<sup>th</sup> day of September, 1994, as follows:

Janice E. Dietz  
5123 Clearview Way  
Missoula, MT 59803

Brice T. McGuire  
P.O. Box 951  
Seeley Lake, MT 59868

Jack & C.B. Rich  
P.O. Box 495  
Seeley Lake, MT 59868

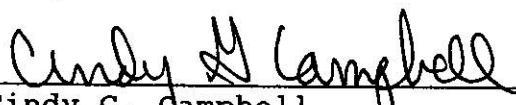
Robert & Patricia Griffes  
P.O. Box 694  
Seeley Lake, MT 59868

Cheryl Burmeister  
P.O. Box 173  
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Larry Howell  
Connell, Beers & Alterowitz  
P.O. Box 7307  
Missoula, MT 59807-7307

Double Arrow Ranch  
Land Owners Assoc.  
% Stan Nicholson, Pres.  
P.O. Box 307  
Seeley Lake, MT 59868

Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary